STATE OF MICHIGAN

COURT OF APPEALS

ZEERCO MANAGEMENT CORPORATION,

Plaintiff-Appellant,

v

CHIPPEWA TOWNSHIP and CHIPPEWA TOWNSHIP BOARD OF ZONING APPEALS,

Defendants-Appellees.

UNPUBLISHED
August 26, 2003

No. 238800
Isabella Circuit Court
LC No. 00-001789-CZ

Before: Hoekstra, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Facts and Procedure

Plaintiff owns a piece of property in Chippewa Township (the township) consisting of approximately forty-eight acres of vacant land. Pursuant to Chippewa Township's zoning ordinance, the majority of the property owned by plaintiff is zoned R-1, or single-family residential. In 2000, plaintiff proposed a plan to develop seventy single-family residential condominiums on the R-1 zoned portion of the property. The site plan listed the size of the lots for the condominiums ranging from .45 acres to 1.03 acres, with the average lot size being .55 acres. However, Chippewa Township Zoning Ordinance § 8.04 provides that each lot in a single-family residential zoned area must be a minimum of one acre.

The Chippewa Township Planning Commission (CTPC) accepted plaintiff's site plan with several conditions, including the condition that plaintiff get a variance regarding the one acre zoning requirement. Plaintiff applied to the Chippewa Township Board of Zoning Appeals (BZA) for a variance from the one acre minimum lot size restriction to permit the development of homes on smaller lots. On March 15, 2000, the BZA denied plaintiff's variance application because it believed that it lacked the authority to grant the variance. However, after plaintiff filed suit against defendants, the parties stipulated that the BZA did, in fact, have the authority to grant plaintiff's application for the variance and agreed to remand the matter to the BZA for rehearing of plaintiff's variance application. On July 26, 2000, the BZA again voted to deny plaintiff's variance application.

Plaintiff filed an amended complaint and claim of appeal, challenging the constitutional validity of the Chippewa Township zoning ordinance's one acre minimum requirement in R-1 zoned areas and arguing that this section of the zoning ordinance was inconsistent with the township's master plan. Plaintiff also alleged that the BZA's decision to deny the variance was not supported by competent, material, and substantial evidence. The trial court granted defendants summary disposition of plaintiff's claims, determining that the zoning ordinance's one acre minimum lot size requirement was not unconstitutional merely because it was inconsistent with the township's master plan and the ordinance did not unreasonably prevent plaintiff from using the property. The trial court further determined that the BZA did not err in finding that it would pose a risk to public safety and welfare if the BZA granted the variance to build the condominiums. Plaintiff appeals as of right.[1]

II. Analysis

A. Standard of Review

The trial court granted summary disposition to defendants under MCR 2.116(I)(2). " 'The trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law.' " *Detroit Free Press, Inc v City of Warren*, 250 Mich App 164, 166; 645 NW2d 71 (2002), quoting *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000). We review de novo a trial court's decision to grant summary disposition. *Id*. We also review de novo a trial court's ruling on a constitutional challenge to a zoning ordinance. *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995).

B. Substantive Due Process

Plaintiff argues that the section of the Chippewa Township zoning ordinance requiring single-family residential lots to be a minimum of one acre is invalid as a violation of substantive due process. We disagree. The question of the reasonableness of zoning ordinances regulating minimum lot sizes has been addressed before in this state. See, e.g., *Padover v Farmington Twp*, 374 Mich 622; 132 NW2d 687 (1965); *Roll v City of Troy*, 370 Mich 94; 120 NW2d 804 (1963); *Christine Building Co v City of Troy*, 367 Mich 508; 116 NW2d 816 (1962); *Scots Ventures, Inc, supra*; *Dunk v Brighton Twp*, 52 Mich App 143; 216 NW2d 455 (1974). The state and federal constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Landon Holdings, Inc v Grattan Twp*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 232406, issued June 17, 2003), slip

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[1] This Court dismissed plaintiff's claim of appeal in regard to plaintiff's challenge of the part of the trial court's decision affirming the BZA decision, but stated that plaintiff's challenge of the trial court's decision to reject plaintiff's claim that the zoning ordinance was unconstitutional remained pending. *Zeerco Management Corp v Chippewa Twp*, unpublished order of the Court of Appeals, entered January 29, 2002 (Docket No. 23800). This Court explained that plaintiff could only appeal the trial court's decision to affirm the BZA by application for leave to appeal. *Id.*

op at 10. Substantive due process requires that zoning ordinances, like all police power legislation, must be reasonably exercised. *Delta Charter Twp v Dinolfo*, 419 Mich 253, 270; 351 NW2d 831 (1984). "A statute or ordinance may not be held invalid unless the objections urged on constitutional grounds appear on the face of the measure in question, or are established by competent proof." *Hitchman v Oakland Twp*, 329 Mich 331, 335; 45 NW2d 306 (1951). In order to afford substantive due process, an ordinance need only be rationally related to a legitimate government interest. *Landon Holdings, Inc, supra*, slip op at 10. A zoning ordinance violates substantive due process and is invalid if it does not advance a legitimate governmental interest. *Hecht v Nile Twp*, 173 Mich App 453, 461; 434 NW2d 156 (1988). A legitimate governmental interest is grounded in the police power and has been defined as including " 'protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public, or any substantial part of the public.' " *Hecht, supra* at 460, quoting *Cady v Detroit*, 289 Mich 499, 504-505; 286 NW 805 (1939). A zoning ordinance also violates due process if it is an unreasonable means of advancing a legitimate governmental interest. *Id.* at 461 Thus, an ordinance must not unreasonably, arbitrarily, or capriciously exclude other types of legitimate land use from the area in question. *Kropf v City of Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974). In *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984), after remand 211 Mich App 214 (1995), the Supreme Court set forth the definitions of "arbitrary" and "capricious":

> "Arbitrary is: " '[Without] adequate determining principle . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.' "
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> "Capricious is: " '[Apt] to change suddenly; freakish; [or] whimsical. . . .' " [*Id*., quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946), and *Bundo v Walled Lake*, 395 Mich 679, 703, n 17; 238 NW2d 154 (1976).]

In order for a court to find that an ordinance violates substantive due process, " '[i]t must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness.' " *Kropf, supra* at 162, quoting *Brae Burn, Inc v City of Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957).

A zoning ordinance is presumed to be valid and the party challenging the ordinance has the burden of showing that it has no real or substantial relation to public health, morals, safety, or general welfare. *Bevan v Brandon Twp*, 438 Mich 385, 398; 475 NW2d 37 (1991), amended 439 Mich 1202 (1991). While courts have the power to determine the validity of statutes and ordinances, courts may not legislate or compel legislative bodies to legislate one way or another. *Kropf, supra* at 162. The judicial branch of government may not question the legislative body's good faith in acting for the public welfare. *Id.*

Plaintiff argues that Chippewa Township's zoning ordinance is inconsistent with the township's 1996 updated master plan, fails to advance a legitimate governmental interest, and unreasonably excludes other types of legitimate land use.

> Whether a zoning classification advances a city's master plan is a factor in determining reasonableness. It is, however, only one factor; it does not replace the balancing of interests required under an assertion of the police power. Some of the other factors to be considered are: the extent to which the goals of the master plan are advanced by the use limitations imposed on a given parcel of land; the stability of the master plan; the extent to which the master plan constitutes a commitment to a coherent development plan for the neighborhood which takes into account existing conditions and legitimate future expectations. While a master plan constitutes a general guide for future development, the validity of a zoning regulation must be tested by existing conditions. *Biske v Troy*, 381 Mich 611, 617-618; 166 NW2d 453 (1969). [*Troy Campus v City of Troy*, 132 Mich App 441, 457; 349 NW2d 177 (1984).]

The Chippewa Township master plan lists among its goals the encouragement of the development of diverse housing types at densities and in locations meeting the housing needs of people of all socioeconomic levels and the development of residential areas that achieve an economy of scale. The master plan encourages the development of residential areas in locations that will not adversely affect the natural resources of the township. The future land use plan of the master plan designates the property owned by plaintiff as "commercial/residential." The master plan states that the commercial/residential area has boundary lines that are "deep enough to provide a reasonable urban design for commercial, low density residential, or medium density residential." Under the master plan, the low density residential area will accommodate one dwelling per acre and the medium density residential area, "with a density of approximately seven units per acre[,] will be incorporated into the Commercial/Residential category." The plan states that public water and sewer facilities were expected to serve the area and that it was hoped that higher density residential housing would prevent a good portion of commercial use in the area. Nonetheless, plaintiff's property was zoned in the R-1 single family residential area, which had a minimum lot size of one acre.

Despite the master plan's contemplation of the development of more densely located residential units in the commercial/residential area where plaintiff's proposed condominium complex is located, we conclude that plaintiff has failed to demonstrate that the zoning provision at issue is totally inconsistent with the township's master plan. The master plan specifically states that the commercial/residential area is large enough to provide for the development of low density housing, as well as medium density housing. Furthermore, the master plan contemplates the development of higher density housing in connection with the development of public water and sewer facilities. However, the evidence reveals that these public sewer facilities have not yet been built. Therefore, although the master plan imagines the development of medium density housing in the commercial/residential area, the township is not necessarily prepared for the implementation of this part of the master plan.

The township's stated reason for the one acre minimum lot size ordinance provision is that the township does not have a sewer system and that the water table cannot support more densely located septic systems. The township claimed to have had "some bad experiences" with

water table issues in two other subdivisions. There were concerns that allowing the installation of more densely located septic systems on plaintiff's property would cause septic problems and would adversely affect the public safety, health, and welfare.[2]

Plaintiff argues that it presented unrebutted evidence that there was no water table problem on the property at issue and that the land could accommodate septic systems on one acre lots. In support of this argument, plaintiff points to the deposition of Tony Zeer, plaintiff's president. Zeer testified that he hired an excavating company around the time he closed on the property because he was concerned about whether the soil would support septic tanks. However, Zeer testified that the excavating company did not investigate the water table and Zeer did not hire a soils engineer to investigate the effects of septic tanks on the soil. Furthermore, Zeer did not testify that the excavating company made any determination that the land could support multiple septic tanks on one acre lots. Plaintiff did not present any other evidence showing that its proposed condominium complex would not cause any septic problems. Therefore, we conclude that plaintiff has failed to carry its burden of demonstrating that the township did not have a legitimate governmental interest for the one acre minimum zoning requirement, that the ordinance " 'is an arbitrary fiat, a whimsical *ipse dixit*,' " or that there is no room for a legitimate difference of opinion concerning the ordinance's reasonableness. *Kropf, supra* at 162, quoting *Brae Burn, Inc, supra* at 432.[3]

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[2] The township presented sparse evidence to support its argument that plaintiff's property could not support smaller than one acre lots with septic systems. The township never conducted any engineering studies concerning the water table on plaintiff's property to determine how many septic systems it could accommodate. But defendants do not have the burden of showing the validity of the ordinance. It is plaintiff that has the burden of showing that the ordinance has no real or substantial relation to public health, morals, safety, or general welfare. *Bevan, supra* at 398.

[3] The cases cited by plaintiff are distinguishable from the present case. For example, in *Christine Building Co, supra* at 512-513, the city's zoning ordinance imposed a 21,780 square foot minimum lot size requirement on parts of the city allegedly to limit the density of the population in proportion to the sewer capacity of the area. The Supreme Court affirmed the trial court's finding that the city's zoning ordinance was unreasonable and arbitrary because the city allowed 8,500 square foot lots in other areas where sewers did not exist, but imposed the 21,780 square foot minimum lot size requirement at issue on a part of the city where a sewer system existed and could accommodate more lots than if a sewer system did not exist. Likewise, in *Hitchman, supra* at 338, the Supreme Court determined that the township's three acre minimum lot size requirement was unreasonable it light of proof that the township's other smaller minimum lot size requirements did not pose a risk to the public health, safety, or welfare. In *Dunk, supra* at 145, the township zoning ordinance imposed a 40,000 square foot minimum lot size requirement on plaintiff's property. The township refused plaintiff's request to rezone the property to allow 15,000 square foot lots. *Id.* at 145-146. At trial, counsel for the township argued that the township's refusal of plaintiff's request to rezone the property was partly due to potential soil problems with septic tanks on the proposed 15,000 square foot lots. *Id.* at 147. However, this Court concluded that the township's 40,000 square foot minimum lot size zoning restriction was unreasonable as it applied to the plaintiff's property because the township presented no evidence to support its contention of septic tank problems and the director of environmental health for the

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C. Regulatory Taking

Next, plaintiff argues that Chippewa Township's one acre lot size zoning restriction constitutes a regulatory taking for which plaintiff was not compensated. Both the United States and Michigan constitutions provide that private property shall not be taken for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2.

> The United States Supreme Court has recognized that the government may effectively "take" a person's property by overburdening that property with regulations. As stated by Justice Holmes, "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922). While all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land. *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 485; 107 S Ct 1232; 94 L Ed 2d 472 (1987). [*K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998).]

As discussed, Chippewa Township's one acre minimum lot size zoning restriction advances a legitimate governmental interest. However, plaintiff also argues that the zoning ordinance denies plaintiff an economically viable use of the property at issue because there is no demand for one acre lots on the property.

> The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).
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> In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. *Lucas*, *supra* at 1015. A person may recover for this type of taking this case of a physical invasion of his property by the government . . . or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." *Id.* at 1019 (emphasis in

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county health department testified that soil test results indicated that the property in question was suitable for 15,000 square foot lots and would not present a danger to the health, safety, or welfare of the township residents. *Id.* at 147-148. In contrast, plaintiff in the present case has not presented competent evidence supporting its argument that the township's concerns about the septic systems in more densely located lots was unreasonable or arbitrary.

> original). In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquiry," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central*, 438 US 124. [*K & K Constr, Inc, supra* at 576-577.]

A mere diminution in the value of the property which results from the regulation does not amount to a taking. *Bevan, supra* at 402-403. In order to show that a zoning ordinance constitutes a taking of property, "an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted." *Id.* at 403, quoting *Kropf, supra* at 162-163.

Plaintiff presented no evidence that the zoning ordinance had a detrimental economic impact on the value of the property or that the ordinance interfered with distinct, investment-based expectations. Zeer testified in his deposition that did not know what he was going to do with the property when he purchased it. He initially attempted to sell the property, but later decided to develop a residential project on the property. When plaintiff put the site plan together regarding the condominium complex, Zeer learned of the one acre zoning restriction. Zeer determined at that time that it was economically unfeasible to develop one acre lots. However, plaintiff did not present any evidence that he had put substantial investments into his plans to build the proposed condominium complex. Zeer admitted that he had not received any bids on the development of a road providing access to the condominiums, the installation of underground facilities, engineering costs, or landscaping costs. He admitted that he had no idea how much it would cost to develop the site. Furthermore, plaintiff did not present any other evidence that the township's one acre zoning restriction caused the property to be unmarketable. Plaintiff had received multiple offers to purchase the property when he was originally planning to sell it. Plaintiff did not present any evidence, other than Zeer's opinion, that it would not be able to sell the property if it were developed as one acre lots as zoned. Zeer merely testified in his deposition that plaintiff would generate more revenue by selling the property as half acre lots than it would if it sold the property as one acre lots. " 'A showing of confiscation will not be justified by showing a disparity in value between uses.' " *Bevan, supra* at 405, quoting *Kirk v Tyrone Twp*, 398 Mich 429, 444; 247 NW2d 848 (1976). Therefore, the trial court did not err in granting defendants summary disposition of plaintiff's argument that Chippewa Township's one acre minimum lot size zoning restriction amounted to an unconstitutional taking.

C. Statutory Arguments

Finally, plaintiff argues that the Chippewa Township zoning ordinance violates the Township Zoning Act, MCL 125.271 *et seq.*, and the Condominium Act, MCL 559.101 *et seq.* However, this argument is not properly before this Court. Only the portion of plaintiff's appeal arguing that the township's zoning ordinance is unconstitutional is properly before this Court. *Zeerco Management Corp v Chippewa Twp*, unpublished order of the Court of Appeals, entered January 29, 2002 (Docket No. 23800). Therefore, we will not address this issue.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Brian K. Zahra